Filed 1/25/13 P. v. Brame CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED BRAME,

Defendant and Appellant.

F062617

(Super. Ct. No. BF127390)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Jerold L. Turner, Judge.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Michael A. Canzoneri, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Fred Brame of possession of a firearm by a felon (former Pen Code, § 12021, subd. (a)(1)) and active participation in a criminal street gang

(Pen. Code, § 186.22, subd. (a)).[1] With respect to the firearm offense, the jury found true a gang-enhancement allegation. In bifurcated proceedings, the trial court found true allegations that Brame had suffered prior felony convictions and served prior prison terms.

Brame contends that his trial counsel provided ineffective assistance by failing to file a pretrial motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) seeking discovery of police personnel files. After trial, new counsel filed a *Pitchess* motion, which the trial court granted, and relevant records were disclosed. Following the *Pitchess* motion, Brame's new counsel filed a motion for new trial on the ground that Brame received ineffective assistance of counsel at trial. The motion was denied.

In this appeal, Brame contends that the trial court abused its discretion by denying the motion for new trial. He also asks that we review the police personnel records filed under seal, which the trial court reviewed in camera after granting the *Pitchess* motion. Brame further contends there was insufficient evidence to support either his conviction for the substantive offense of active gang participation or the true finding with respect to the gang-enhancement allegation. Finally, Brame raises two challenges related to his sentence. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

Around 9:00 p.m. on March 20, 2009, Bakersfield police officers responded to a report of a possible fight at a large gang-related party on the 3400 block of Horne Street. Three men were seen running from the area of the party westbound toward Lotus Lane. Officers Kroeker and Stratton were in a patrol car with a side-mounted spotlight driving north on Lotus when they spotted Brame and two other men in a vacant field. Brame was on his knees and appeared to be making a digging motion with his hands. The other two

[1]Subsequent statutory references are to the Penal Code unless noted otherwise.

men—identified as Franklin Langston and Lydell Chaney—were lying on the ground on their stomachs. Kroeker estimated that the field was about 30 or 40 yards wide and about 100 yards deep, and the three men were around three to five feet away from each other. There were weeds and brush in the dirt field, which looked to Kroeker like it may have had houses at one time, but was now empty.

The officers pulled over and approached the men on foot. Langston and Chaney got up and ran away, but Brame remained in the field. Kroeker put Brame in handcuffs and took him to the patrol car. Langston and Chaney were apprehended by other officers the same night. After Brame was taken away, Officer Stratton found a revolver-style firearm in the field. It was partially buried—there was a dirt hole and the firearm protruded from the hole and was covered by a little bit of dirt. Stratton estimated it was within a foot or two from where they had found Brame. According to Kroeker, when Langston and Chaney were lying in the field, they had been within an arm's length of where the firearm was found.

Brame was asked what he was doing in the vacant field. According to Officer Kroeker, Brame responded that he was leaving the party on Horne Street and he went to urinate in the field, and then he heard fighting, so he got down on the ground. The officer asked why he was digging and Brame denied that he was digging. Brame also denied any knowledge of the firearm. Kroeker had not seen any wet spots in the area of the field where he found Brame.

In an amended information, the Kern County District Attorney charged Brame with three counts: (1) carrying a loaded firearm by a gang member (former § 12031, subd. (a)(2)(C)); (2) possession of a firearm by a felon (former § 12021, subd. (a)(1)); and (3) active participation in a criminal street gang (§ 186.22, subd. (a)). With respect to the first and second counts, it was alleged that the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) With respect to the first and third counts, it was alleged that the offense was a serious felony, and Brame had been convicted of a

prior serious felony within the meaning of section 667, subdivision (a). For all three counts, it was alleged that Brame had been convicted of a prior felony offense (§§ 667, subds. (c)-(j), 1170.12) and had served two prior prison terms (§ 667.5, subd. (b)).

A jury trial began on May 14, 2010. Officers Kroeker and Stratton testified about apprehending Brame in the vacant field. Stratton explained that when a person is booked into Kern County jail, he is asked a series of questions concerning potential safety issues, including health status and gang affiliation. Stratton testified that when Brame was booked into jail that night, he identified himself as a Country Boy Crip and asked to be housed as such. Further, Brame had the words "Country Boy" tattooed above his eye and had gang tattoos on his chest, arms, and back. In addition, Stratton was familiar with the other two men in the field, Langston and Chaney. He had arrested Langston for possession of narcotics for sale, possession of a firearm, participation in a criminal street gang, and resisting arrest. Langston was known as "Precious" or "Prep." Stratton believed that Chaney was a gang member.

The prosecution called Bakersfield Police Officer Woessner as an eyewitness and gang expert. On the night of Brame's arrest, Woessner was on duty and present at the gang party on Horne Street. He saw a large group of people gathered in the street and on the sidewalk and heard people yell, "rollers" and "5-0," referring to law enforcement. He saw three men running westbound, two wore dark clothing and one was dressed in red. Another officer reported about the three men over the police radio.

In his capacity as a gang expert, Woessner testified that the Country Boy Crips are a street gang engaged in an ongoing pattern of criminal conduct. The gang-related party and the vacant field where Brame was found are within Country Boy Crips territory.[2] Woessner testified that firearms are used in gangs to instill fear or respect and are often

[2]Officer Woessner testified that the criminal street gangs Crips and Bloods are active in Bakersfield. Subsets of the Crips are East Side Crips, West Side Crips, and Country Boy Crips.

shared among gang members. He explained, "I have seen that a lot of times when there are more than one or two gang members around, typically most of those individuals will know where the firearm is kept should they need to retrieve it during some type of rival gang activity, or they will want to know where it is in case law enforcement comes into the area and they can distance themselves from that."

Officer Woessner reviewed booking reports, field interview cards, street checks, and police reports for Brame, Langston, and Chaney. He explained that officers complete a field interview card after they have made contact with a person on the street. A card contains general information about the person such as name, date of birth, and address, along with information about tattoos, manner of dress, and the reason for the contact. A street check is a computerized version of the field interview card. In his opinion, they all were members of the Country Boy Crips.

Woessner reviewed 13 police reports involving Brame. He found seven reports to be significant to his opinion that Brame was a gang member. In most of the reports, the significance was Brame's association with other known Country Boy Crips members. In some of the reports, Brame was arrested for crimes related to gang activity; in one instance, he was wearing gang colors. Woessner reviewed five field interview cards and street checks involving Brame and found four of them to be significant. In the most recent street check—from April 2008—an officer asked Brame if he was a Country Boy Crips gang member and he responded, "Yes, sir, I'm Country." Reviewing booking information, Woessner found that Brame usually identified himself as a member of the Crips and many times indicated that he was a member of the Country Boy subset of the Crips. Brame asked to be kept away from members of the Bloods and other rival gangs.

Woessner testified that, in his opinion, if three members of the Country Boy Crips were found lying in a vacant field within their gang territory with a partially buried firearm nearby, all three would have possession of the firearm and they would possess the firearm for the benefit of the Country Boy Crips.

The defense theory of the case was that Brame was no longer an active gang member and he had nothing to do with the firearm, which belonged to Langston. Brame had been a gang member in the past, but he had turned his life around recently. He was now a hard worker, he did not take drugs, and he stayed out of trouble. He was not at the gang party that night; he was at a barbecue in the same neighborhood. As Brame's attorney explained in his opening statement, the other two men in the field ran from the police because they were doing something wrong, but Brame remained "because he had nothing to hide. He was just an ordinary guy, walking through the field."

A defense witness testified that Brame was at the witness's father's house on March 20, 2009, for a barbecue. Brame left the house around 8:00 or 8:30 p.m. He said he was going to the store. Another witness testified that she had been at the party on the 3400 block of Horne Street from noon until the police came, and she never saw Brame at the party. She also testified that she was sure there were Country Boy Crips at the party because it is their neighborhood. An office manager at the staffing company where Brame worked testified that Brame was a great employee—hard-working, responsible, and punctual.

Deborah Wesson, Brame's mother, testified that she had seen a big change in her son in the previous three years. She used to be disappointed in him because of the people he hung around and his lack of responsibility, but now he was working, he had a bank account for the first time, and he dressed neatly. Wesson retained a defense attorney for her son in this case, which she had never done before, although he had been arrested numerous times and had been sent to prison in the past.

Shelly Miller, Brame's girlfriend, testified that he had changed in the time she has known him. In the previous five years, Brame did not claim gang membership, and she had never seen him carry a gun. In addition, Miller worked at a Chevron mini-mart, and she knew Officer Kroeker because he would stop by the mini-mart and chat with her. Miller testified that Kroeker came into the mini-mart some time after Brame was arrested,

and she asked him why he was lying about her boyfriend. Miller told him that it made no sense, that a person being chased by the police would try to dig a hole and bury a gun. Miller's coworker then asked Kroeker, "Well, who [do] you think had the gun?" According to Miller, Kroeker responded that he believed Precious had the gun.

Kathleen Cooper Birks, Miller's coworker at Chevron, also testified. Birks recalled that Kroeker came into the mini-mart in January 2010 in his police uniform. Kroeker said, "Hi Shelly. You know you love me." Miller responded that they were not friends and she had nothing to say to him. Miller asked Kroeker why he lied about her boyfriend. He said, "You know that he was at that party" (presumably referring to the gang party). Miller responded that he was not. Kroeker asked how Brame had the money to pay for a private defense attorney, and Miller said it was none of his business. Kroeker said, "Shelly, you know one of the three of them had the gun. There were three of them there." He explained that Brame did not have to physically have the gun to have possession of the gun. At this point, Birks interrupted and asked Kroeker if he had seen Brame with the gun. Kroeker said that he did not see anybody with the gun and it was found in the field. Birks asked who he really thought had the gun, and Kroeker said, "I think it belonged to Precious."

The defense's last witness was Langston. He testified that he was a Country Boy Crips gang member and the police call him "Precious." On the night he was arrested, Langston was standing on Horne Street across the street from a party. He was wearing red and black clothing and was carrying a firearm and rock cocaine in his pocket. He saw women in the street fighting, and when the police showed up, he ran. At the next street, the police shined a light on him, and he lay down in a field. Langston testified that he dropped his firearm; it fell out of his pocket. Langston did not recall whether anyone was around him in the field. The prosecutor asked if Chaney was with him, and Langston responded that he did not know who that was. He was familiar with Brame, however, because their wives were best friends. Langston ran from the police because he did not

want to go jail, but he was arrested that night. He was charged with possession of rock cocaine base for sale, possession of a loaded firearm, and gang participation. He took a plea bargain, and at the time of Brame's trial, Langston was serving a prison term for possession of a firearm.

The prosecution recalled Officer Kroeker as a witness. He testified that he spoke to Langston the night he was arrested, and Langston denied that he was in the vacant field and denied knowledge of the firearm. Kroeker confirmed that he used to stop at the mini-mart where Miller worked. He described their relationship as casual and joking before Brame was arrested. Kroeker did not recall saying that he loved her. He testified that Miller said that she believed the firearm belonged to Precious. He denied telling Miller that the firearm belonged to Precious. Kroeker did not recall mentioning Precious to Miller, although he did talk about how the crime of possession of a firearm did not require a person to be holding it. He talked about how gang members who are around a firearm can be arrested for possession of it. He did not recall that Birks interjected during any conversation he had with Miller.

In his closing argument, Brame's counsel pointed out what was missing from the prosecution's case. Fingerprints were not taken of the firearm, which could have established that Brame possessed the gun. In addition, there were no photographs of Brame's hands from the night he was arrested, which could have shown whether his hands were crusted with dirt or his fingernails were filled with dirt, as would be expected if he had dug a hole in the dirt with his hands.

The jury reached a verdict on May 24, 2010. It found Brame not guilty of count 1, carrying a loaded firearm by a gang member. The jury found Brame guilty of count 2, possession of a firearm by a felon, and count 3, active participation in a criminal street gang. The jury also found true the gang-enhancement allegation for count 2.

The trial court then held a bench trial on the allegations that Brame had prior felony convictions and had served prior prison terms. The court found all of the

enhancement allegations true based on criminal cases from September 1999 and May 2006.

After a conflict developed between Brame and his attorney, the court appointed new counsel to represent Brame in a motion for new trial and at sentencing. Brame's new counsel filed a motion for new trial on the ground that Brame received ineffective assistance of counsel at trial.

On May 16, 2011, the trial court denied the motion and sentenced Brame. On May 25, 2011, the court held another hearing and corrected the sentence. Brame was sentenced to 12 years for count 3, and the term for count 2 was stayed. He filed a notice of appeal the same day.

DISCUSSION

I. Motion for new trial

Brame contends that the trial court abused its discretion by denying his motion for new trial. We disagree.

A. Background

On January 28, 2011, Brame's new counsel filed a *Pitchess* motion, seeking police records for Officers Kroeker and Stratton related to complaints "for fabrication of the truth, misstating facts or material misstatements in reports or other unethical behavior." In the motion, Brame denied that he was digging in the field the night he was arrested and denied that he tried to hide from the police. He also denied that he claimed Country Boy Crips gang membership when he was booked into jail that night.

The trial court granted the *Pitchess* motion and conducted an in camera review of the personnel files of the officers, including citizen complaints filed against either officer. It determined that three complaints related to Kroeker and six complaints related to Stratton were relevant and had to be disclosed.

On April 22, 2011, Brame's new counsel filed a motion for new trial on the ground that trial counsel provided constitutionally ineffective assistance by failing to file a

pretrial *Pitchess* motion.[3] From the citizen complaints disclosed following the posttrial *Pitchess* motion, investigators for Brame's new counsel were able to locate two witnesses, Anthony English and his mother, Loretta English, who had filed complaints against both Kroeker and Stratton. In one complaint, Anthony asserted that the police pulled him over without cause, and Kroeker gave him an "untruthful ticket."[4] This complaint was dated July 20, 2009, and the incident allegedly occurred that month.

In another complaint, Anthony claimed that Stratton and another officer arrested Anthony for public intoxication although he was not drunk. This incident occurred in November 2009, but the complaint form was dated January 14, 2010. In a third complaint, dated March 17, 2010, Loretta complained that Stratton approached her and was looking for Anthony; Loretta believed that Stratton "placed some type of threat on Anthony's life." It is not clear from the complaint, however, why she thought Stratton was threatening her son.

In Brame's motion for new trial, he argued that if Anthony and Loretta had been discovered pretrial, they could have been called as witnesses to challenge the credibility of Kroeker and Stratton. Brame further argued that if these witnesses had been presented to impeach the officers, it was possible that Brame would have testified on his own behalf. He explained, "If Loretta and Anthony English had been discovered and presented at trial then Mr. Brame[']s testimony denying the representations made by the

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[3]Attached to the motion was a document that appeared to be a letter to trial counsel written by Brame and dated December 10, 2009. In the letter, Brame wrote that he would like a *Pitchess* motion to be filed, referring to Officers Stratton and Woessner, but not Kroeker. As we have described, however, Brame's new counsel filed a posttrial *Pitchess* motion requesting documents related to Stratton and Kroeker, but not Woessner.

[4]Anthony was issued a ticket for failing to signal (Veh. Code, § 22108) and possession of marijuana (Health & Saf. Code, § 11357, subd. (b)). According to an internal investigation of the complaint, Anthony denied failing to signal and denied that the marijuana, which was found in his car, belonged to him. He did not accuse the officers of planting evidence.

officers would not have been seen in a vacuum and self-serving." Appearing to acknowledge that he could not demonstrate how trial counsel's failure to file a *Pitchess* motion caused him prejudice, Brame argued reversal was required "despite an absence of demonstrated prejudice …."

In an opposition, the prosecutor argued, first, that trial counsel was not constitutionally ineffective, noting that he did extensive investigation and presented many witnesses for the defense, and, second, that Brame failed to demonstrate prejudice. The opposition included police records showing that Anthony was on probation with search terms for narcotics and weapons at the time of the alleged incidents, and he was a known active member of the East Side Crips. In addition, documents showed that Anthony was arrested in May 2010 and later went to trial and was convicted of possession and transportation of marijuana for sale and active gang participation. If Anthony had testified at trial, the prosecutor argued, his gang and criminal activity would have been used to impeach his credibility, "as was done with witness Mr. Langston."

On May 16, 2011, the trial court heard argument on the motion for new trial. Brame's new counsel told the court that there were nine people (apparently referring to other complainants disclosed from the *Pitchess* motion), but his investigator could not find any of them. He speculated that the complainants may have been found if trial counsel had known about them before trial and argued that there was prejudice in "the time delay as to finding witnesses who could have been available at trial."

Brame's new counsel further argued: "[T]he only testimony that came in about Mr. Brame's position [in the vacant field], Mr. Brame digging the hole, … where the gun was found … came in through the officers.… [Brame's girlfriend Miller and Birks] basically stated that at some point an officer … suggested that they got Mr. Brame on a trumped up charge. That's not what was said but it was basically … we got your boyfriend … [on a charge of] having a gun when it really wasn't his." A pretrial *Pitchess*

motion could have resulted in witnesses who would testify about the officers' lack of credibility.

The trial court denied the motion for new trial. The court explained that it did not matter that nine other complainants had been disclosed; the motion for new trial was based only on the identified witnesses, Anthony and Loretta English. "Nine names may have been released but that's the nature of Pitchess. Not always do we find the individuals whose names are released."

The court recalled that evidence was presented impeaching Kroeker's testimony about his conversation with Miller at the mini-mart. The court stated:

> "Now as to the issue of … credibility. If I suppose we're attacking what they observed in the field that certainly I guess is some issue of credibility that could be tested in the form of evidence that may have been disclosed at a Pitchess with regard to honesty. But the issue of the honesty that was directed in this particular event had nothing to do with what was observed in the field. The direction of the dishonesty had to do with whether or not Officer [Kroeker] made the statement in the convenience store.
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> "Now, two witnesses testified that he did. As I recall, he didn't remember stating it in that fashion. But I disagree that it was in the nature that this was a trumped up charge. The nature of the statement as I recall the evidence was … not that … Mr. Brame was not in the vicinity of the gun or was not in the area of where he was attempting to flip dirt on the gun. It was they didn't believe that it was his gun."

The court then considered the potential testimony of Anthony and Loretta English. The court observed that, in Brame's case, the last motion date prior to trial was December 15, 2009. Thus, any complaints by the Englishes made after that date would not have been disclosed even if trial counsel had filed a pretrial *Pitchess* motion. The court recognized that Anthony's complaint regarding an incident with the police in July 2009 was relevant to Kroeker's credibility, but it noted that Anthony was on felony probation for possession of a gun at the time of the incident and was also known to be a

member of the East Side Crips. The court questioned whether Anthony's complaint was credible:

> "So the 402 hearing would have been very interesting as to whether or not the court would have allowed the Englishes to testify in any event because all of the information and the evaluation and the other witnesses involved in the incident would have had to have been brought in in order to testify with regard to the internal investigation itself and what it revealed and how the conclusion of the internal investigation resulted in the findings that it did, all of which the defense doesn't have but we would have conducted it and they would have been disclosed in the 402 and it would have been determined that it was as I recall unfounded. [5] Certainly a probationer who is on probation for possession of a weapon with search terms, it certainly is dubious they are claiming harassment when they're requested to stand for search."

In addition, Anthony was arrested for selling drugs and active gang participation before Brame's trial started. Under those circumstances, the court doubted that Anthony's counsel would have advised him to testify in Brame's case. The court reasoned that it was unlikely that Anthony's testimony would have been admitted. "[S]uffice it to say I know and I conceded that Mr. English would not say anything kind about the veracity of either Kroeker or Stratton. That's a given. But whether or not he would even have been allowed to testify at the trial even without the charges pending I think is questionable at best and I doubt seriously that I would have granted a 402 hearing to present the evidence after determination of the nature of the case." Since it was highly unlikely Anthony would have testified, there was no showing of prejudice. The court concluded:

> "Now, we all have the hindsight of 20/20 looking back to see what would have occurred, but I think that Mr. English's situation provides largely collateral evidence of veracity when I had direct evidence of veracity that was admitted during the course of the trial that indicated that [Kroeker] was being dishonest. So that being the case, I don't see a lot of substantial prejudice to Mr. Brame because English couldn't have testified

[5]The complaint was determined to be unfounded.

> in any event and probably wouldn't have testified in any event because of the charges that he would have had hanging over his head and the other circumstances that would have been brought out had he testified even at a 402 hearing with regard to his gang involvement …. So the circumstances I find I cannot find that there's substantial prejudice."

B. Analysis

We review for abuse of discretion a trial court's ruling on a motion for new trial. (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261.)

A motion for new trial may be based on alleged ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.) A claim of ineffective assistance of counsel has two components. A defendant must establish: "[1] that his counsel failed to perform with reasonable competence and [2] that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings." (*Id*. at p. 584.) Prejudice must be affirmatively proved. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

Brame contends that investigation is a central part of effective representation and by failing to file a *Pitchess* motion, trial counsel failed to conduct an adequate investigation. We need not decide whether reasonably competent representation required the filing of a pretrial *Pitchess* motion in this case because Brame has failed to demonstrate prejudice.

Brame argues that the posttrial *Pitchess* motion "yielded impeachment material" in the potential witnesses Anthony and Loretta English. He also speculates that it would have been more likely that the other nine complainants disclosed in the posttrial *Pitchess* motion would have been found if the motion had been filed before Brame's trial.

We agree with the trial court that any complaints made after the motion's deadline would not have been disclosed in a pretrial *Pitchess* motion and therefore are not relevant to Brame's ineffective-assistance-of-counsel claim. We also agree that speculation about other complainants does not demonstrate prejudice. (*People v. Medina* (1995) 11 Cal.4th 694, 773 [claim of ineffective assistance of counsel cannot be established by mere speculation about testimony of potentially available witnesses].)

Brame's argument ignores the trial court's reasoning that it was highly unlikely that Anthony's testimony about the July 2009 traffic stop by Officer Kroeker would have been presented at trial. First, it was unlikely that Anthony would have chosen to testify, given that he was in criminal proceedings himself during Brame's trial. Second, as the trial court explained, it was doubtful that it would have allowed Anthony to testify, suggesting that the court would have found Anthony's testimony about his interactions with the police in July 2009 not to be credible.

When a motion for new trial is based on newly discovered evidence, "the trial court may consider the credibility as well as materiality of the evidence in its determination whether introduction of the evidence in a new trial would render a different result reasonably probable …." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 202, disapproved on other grounds by *People v. Blacksher* (2011) 52 Cal.4th 769, 808; see also *People v. Earp* (1999) 20 Cal.4th 826, 890 [no abuse of discretion where trial court found new evidence "'inherently untrustworthy … and not worthy of belief'"].)

Similarly, in this case, the trial court could consider the credibility and materiality of Anthony's potential testimony to determine whether there was prejudice from the failure of trial counsel to discover the Englishes. The trial court stated that Anthony's allegations of police misconduct were "dubious" and indicated that if there had been a hearing under Evidence Code section 402 regarding Anthony's testimony, the court likely would not have allowed the testimony. In addition, the court could have excluded Anthony's testimony under Evidence Code section 352, which allows "the trial court

broad power to control the presentation of proposed impeachment evidence '"'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]"'" (*People v. Mills* (2010) 48 Cal.4th 158, 195.)

To establish prejudice to support his motion for new trial, Brame had to show that it was reasonably probable he would have obtained a more favorable result if trial counsel had filed a pretrial *Pitchess* motion and learned of Anthony's complaint against Kroeker. Given that the trial court would not have allowed Anthony to testify, there could be no possible prejudice to Brame; the trial would have proceeded as it did, without impeachment testimony from Anthony.

Brame argues, however, that the trial court erred by using the wrong legal standard to decide the motion for new trial. He relies on the fact that the court used the phrase "substantial prejudice" twice in explaining its ruling. The court stated, for example, "I don't see a lot of *substantial prejudice* to Mr. Brame because English couldn't have testified in any event and probably wouldn't have testified in any event …." (Italics added.) Brame argues that the trial court must have imposed a higher burden on Brame than the burden to show prejudice. We are not persuaded. We assume that the trial court simply misspoke when it used the word "substantial" since nothing else in the reporter's transcript indicates that the trial court misunderstood the prejudice standard.

Further, as we have discussed, the trial court essentially determined that Anthony would not have testified at Brame's trial, either because Anthony would have chosen not to testify or because the court would have excluded his testimony. As a result, there could be no prejudice to Brame under any standard.

Brame also argues that the trial court's decision was erroneously based on its finding that Anthony's testimony "provides largely collateral evidence of veracity …." The trial court was correct, however, in describing Anthony's proposed testimony as collateral. If allowed as a witness, presumably Anthony would testify that Kroeker gave him an "untruthful ticket" during a traffic stop in July 2009. While this testimony would

be relevant to attack Kroeker's credibility, it would be "collateral" in that it would not be directly relevant to the issues being tried.[6] Had trial counsel offered Anthony's testimony at trial, the trial court would have had broad discretion to exclude Anthony's testimony to avoid "nitpicking wars of attrition over collateral credibility issues," such as whether there was a legitimate basis for the ticket Anthony received in July 2009, whether Kroeker honestly believed there was a legitimate basis for issuing Anthony a ticket, and Anthony's credibility. (*People v. Mills, supra,* 48 Cal.4th at p. 195.) The trial court did not abuse its discretion by taking this into consideration in deciding the motion for new trial.

Finally, Brame argues that the trial court abused its discretion when it erroneously found that "the issue of the honesty … had nothing to do with what was observed in the field." We disagree. The court correctly recalled that at trial there was evidence contradicting Kroeker's testimony about his conversation with Miller at the mini-mart, but there was no testimony contradicting the officers' version of what they observed in the vacant field the night they arrested Brame. Brame did not testify and Langston did not recall seeing anyone in the field. As a result, no testimony was presented to contradict the officers' testimony that they saw Brame making a digging motion with his hands. The court's statement does not suggest to us that it abused its discretion in deciding the motion for new trial.

II. Sufficiency of the evidence

Brame next contends there was insufficient evidence to support either his conviction for count 3, the substantive offense of active gang participation, or the true

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[6]As explained in the Law Revision Commission Comments to Evidence Code section 780, "The so-called 'collateral matter' limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend."

finding for the gang enhancement in count 2. We conclude that Brame's contention is without merit.

When an appellant raises a claim of insufficiency of the evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. [Citation.] We may reverse for lack of substantial evidence only if '"upon no hypothesis whatever is there sufficient substantial evidence to support"' the conviction or the enhancement. [Citation.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508.)

A. Active gang participation

Section 186.22, subdivision (a), provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

Our Supreme Court has explained that the offense of active gang participation has three elements: "(1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*).)

In this case, Brame argues that the prosecution failed to present sufficient evidence that he continued to be an active gang member after he was released from prison in 2007.

We disagree. First, there was testimony that Brame identified himself as a member of the Country Boy Crips on the night he was arrested. The circumstances of the arrest were that he was found near a gang party in a vacant field with two other known Country Boy Crips. He had gang tattoos on his face and body. Officer Woessner testified that Brame told a police officer in April 2008 that he was a member of the Country Boy Crips. This was substantial evidence of continued active gang membership. (See, e.g., *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331 [sufficient evidence of active gang membership where gang expert relied on, among other things, defendant admitting he was gang member after arrest and gang tattoo over defendant's eyebrow]; *People v. Williams* (2009) 170 Cal.App.4th 587, 626 [sufficient evidence that defendant was active gang member based on, among other things, defendant's gang tattoos and his admission of gang membership during jail intake process and during previous traffic stop].)

Brame points out that, other than the street check in April 2008, Officer Woessner did not provide the dates of the booking reports, field interview cards, street checks, and police reports on which he relied. Brame argues that Woessner relied on "untested, unverified hearsay recitals by victims and witnesses, as well as extrajudicial statements by arrestees and the police." Even without the gang expert testimony, however, the circumstances of Brame's arrest, his admission of gang membership, and his tattoos were sufficient evidence of his current active gang membership.

Further, "[e]xpert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.) "Thus, a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies." (*Ibid.*) Brame cites no authority for the proposition that the

police reports and other records Woessner reviewed are not the type of material gang experts reasonably rely upon in forming opinions.

B. Gang enhancement

Section 186.22, subdivision (b)(1), provides a sentencing enhancement to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …."

Brame does not challenge the sufficiency of the evidence supporting his conviction for count 2, possession of a firearm by a felon. He only contends that there was insufficient evidence to show the offense was committed (1) for the benefit of the Country Boy Crips and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Brame argues that a defendant's record of prior offenses and past gang activities is insufficient to show that the current crime benefited the gang. Not every crime committed by a gang member is for the benefit of a gang. (*Albillar, supra*, 51 Cal.4th at p. 60.) In this case, however, there was additional evidence from which the jury could find that Brame's crime was committed for the benefit of the Country Boy Crips. Three men were seen running from a gang party and, immediately thereafter, Brame was found with two other gang members hiding in a field nearby. Brame appeared to be digging a hole in the dirt, and minutes later, a firearm was found in the dirt partially buried. Langston, one of the other gang members, testified that he had been carrying the firearm. Officer Woessner testified that firearms are used in gangs to instill fear, gain respect, commit crimes, and for protection from rival gangs. He also explained that gang members often share firearms. From the evidence, the jury reasonably could deduce that Brame was at the gang party with Langston and another gang member. Given the jury's uncontested finding that Brame had possession of the firearm, the evidence also supports

a finding that Brame possessed the firearm for the benefit of the Country Boy Crips—likely sharing possession with fellow gang member Langston.

Brame argues that a gang expert's testimony alone is insufficient to show that an offense is gang-related. *People v. Albillar, supra,* 51 Cal.4th 47, is instructive in assessing gang expert testimony. In that case, three gang members forcibly raped a 15-year-old girl, with one after the other raping her. (*Id*. at pp. 50-52) A gang expert testified that a hypothetical gang rape under these circumstances would have been committed for the benefit of, at the direction of, or in association with a criminal street gang. He based his opinion on the way the gang members worked together to accomplish the rape and the enhancement to the reputations for violence and viciousness of the gang and the participating gang members. (*Id*. at pp. 53-54.) On appeal, the defendants argued there was insufficient evidence to support a gang enhancement to their rape convictions, but the Supreme Court rejected their claim. The court relied on the gang expert's opinion, explaining, "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of ... a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*Id*. at pp. 59, 63.) Likewise, in this case, expert opinion that possession of a firearm would benefit a gang by instilling respect and fear was sufficient to raise an inference that Brame possessed a firearm for the benefit of the Country Boy Crips.

Finally, we reject Brame's claim that there was insufficient evidence that the offense was committed to promote, further, or assist in any criminal conduct by gang members. Brame was arrested with two fellow gang members, one of whom testified that he was carrying the firearm and that he subsequently took a plea bargain and was in prison for possession of a firearm. Evidence that Brame shared possession of the firearm with another member of the Country Boy Crips was sufficient to support a finding that he committed the offense to promote, further, or assist in criminal conduct by gang members.

(*Albillar, supra,* 51 Cal.4th at p. 68 ["[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members"]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime"].)

III. Pitchess motion

Brame filed a posttrial *Pitchess* motion seeking documents related to complaints of dishonesty against Officers Kroeker and Stratton. Brame asks that we review the sealed record of the trial court's in camera review of the personnel files of Kroeker and Stratton.

"In *Pitchess, supra,* 11 Cal.3d 531 …, the court 'established that a criminal defendant could "compel discovery" of certain relevant information in the personnel files of police officers by making "general allegations which establish some cause for discovery" of that information and by showing how it would support a defense to the charge against him.… To initiate discovery, the defendant must file a motion supported by affidavits showing "good cause for the discovery," first by demonstrating the materiality of the information to the pending litigation, and second by "stating upon reasonable belief" that the police agency has the records or information at issue.' [Citation.]" (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1477 (*Nguyen*).)

In the usual case, a defendant files a *Pitchess* motion before trial, in preparing defenses for trial. In *People v. Nguyen*, *supra,* 151 Cal.App.4th at page 1476, as in Brame's case, the defendant filed a *Pitchess* motion after trial, seeking police personnel records to support a new trial motion in which he intended to claim ineffective assistance of counsel based on trial counsel's failure to file a pretrial *Pitchess* motion. In this

situation, the *Nguyen* court explained, the issue is whether the requested records would support a motion for new trial:

> "After defendant was convicted, the 'pending litigation' to which the requested records had to be material was his new trial motion claiming ineffective assistance. [Citations.] To prevail on this claim, defendant would have to show a 'reasonable probability' that competent performance would have led to a different result. [Citation.] Thus, the proper standard for reviewing defendant's posttrial *Pitchess* motion was whether a reasonable probability existed that disclosure of the requested records would have led to a different result at trial." (*Nguyen, supra,* 151 Cal.App.4th at p. 1478.)

The *Nguyen* court went on to affirm the trial court's ruling, explaining that "the [trial] court correctly reviewed [defendant's] posttrial *Pitchess* motion through the lens of his new trial motion claiming ineffective assistance—this was the only litigation pending at the time." (*Nguyen, supra,* 151 Cal.App.4th at p. 1478.)

In the present case, the question before the trial court was whether the requested records were material to Brame's motion for new trial based on ineffective assistance of counsel. We review the trial court's ruling on the *Pitchess* motion for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) "Consistent with customary procedure, the records have been made part of the record on appeal but have been sealed, and appellate counsel for defendant have not been permitted to view them." (*Ibid*.)

We have reviewed the files for Officers Kroeker and Stratton. We find no abuse of discretion, with the possible exception of one complaint that may have been relevant to the *Pitchess* motion but was not disclosed. This complaint is dated October 15, 2008, and was filed against Stratton. In the narrative section of the complaint form, the complainant wrote that Stratton went to her residence on September 14, 2008, and "fabricated that he was seizing my house without a warrant nor probable cause pursuant to the 4th and 14th Amendment[s] placing his foot inside my doorway preventing me from closing door …." The investigation report attached to the complaint shows that an investigator was unable to contact the complainant for an interview.

It is possible that the trial court did not recognize this complaint as potentially responsive to the *Pitchess* request because the complaint allegations were described as "[h]arassment" and "[i]llegal entry," not "false statements," "false arrest," or other allegations that would indicate misstatements by the officer. We see no possible prejudice from this omission, however, because a related complaint filed by the complainant's boyfriend was disclosed. The boyfriend's complaint described the same incident, and the allegations were characterized as "false arrest." We also observe that the complainant was identified in her boyfriend's complaint as a witness to the incident. Under these circumstances, the failure to disclose the girlfriend's complaint could not result in prejudice to Brame.

IV. Sentencing issues

On May 16, 2011, the trial court issued its sentence. Brame's trial counsel previously filed an invitation to the court to exercise its discretion under section 1385 to dismiss Brame's prior felony from May 2006. He asked the court to consider that Brame was 35 years old and most of his criminal history related to his use of crack cocaine. He had been able to find full-time employment and maintain a long-term relationship with his girlfriend. He also had the support of his family. He had not been convicted of violent acts and he denied affiliation with the Country Boy Crips for many years. Brame's counsel argued, "Unfortunately, due to Mr. Brame's location of family and friends and his prior tattoos, none [of] which were recently acquired, he cannot avoid coming into contact with gang members or being associated with them." He asked the court to take mercy on him.

The probation officer's report identified three aggravating factors: (1) Brame's prior convictions as an adult are numerous; (2) he was on parole when the crime was committed; and (3) his prior performance on probation and parole was unsatisfactory in that he continued to reoffend and failed to abide by terms and conditions. The report recommended the upper term for both counts.

The court denied Brame's request to dismiss the prior felony, observing that Brame was on parole for the May 2006 conviction at the time he was arrested in this case. The court sentenced Brame to the middle term of four years for count 2, plus four years for the gang enhancement (§ 186.22, subd. (b)(1)), another five years for the prior felony conviction (§ 667, subd. (a)), and one year for a prior prison term (§ 667.5, subd. (b)), for a total fixed term of 14 years. For count 3, the court stated, "On this I will impose the upper term because of the nature of this particular case and the evidence presented." The court denied probation and sentenced Brame to six years in state prison. The sentence for count 3 was stayed pursuant to section 654.

On May 25, 2011, the trial court held another hearing. The court explained that after the sentencing hearing, it became aware that certain charges and enhancements did not apply. In particular, the five-year enhancement of section 667, subdivision (a), did not apply to count 2 (possession of a firearm by a felon); as a result, count 2 could not be the principal term. The court stated, "Accordingly, the court is electing to recall the sentence under 1170(D) for the purpose of clarifying the record and reallocating the enhancements." The court asked for comments and Brame's new counsel had none and submitted.

The court sentenced Brame to the upper term of six years for count 3, plus five years for the prior felony conviction (§ 667, subd. (a)), plus one year for a prior prison term (§ 667.5, subd. (b)), for a total fixed term of 12 years. For count 2, the court sentenced Brame to the middle term of four years, plus four years for the gang enhancement (§ 186.22, subd. (b)(1)), and stayed the sentence.

On appeal, Brame argues that the trial court erred in recalling his sentence and abused its discretion in failing to dismiss his prior conviction.

A. Recall of sentence

Section 1170, subdivision (d), provides that a trial court may, within 120 days of the date of commitment, "recall the sentence and commitment previously ordered and

resentence the defendant in the same manner as if he or she had not previously been sentenced …." "This necessarily includes the rule that the court must state in simple language the primary factors which support the exercise of its discretion in denying probation and sentencing the defendant to state prison." (*People v. Arnold* (1988) 206 Cal.App.3d 88, 90-91.)

Brame contends that the trial court failed to state the reasons for its sentencing choices when it resentenced him on May 25, 2011. The People respond that Brame has forfeited the issue by failing to object. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1297 ["By failing to raise a contemporaneous request for the court to state reasons for its sentencing decisions, defendant failed to preserve the claim for review"].) We agree that the issue has been forfeited.

Even if the issue had not been forfeited, however, there would be no reversible error. The trial court stated its reasons for its sentencing choices when it first imposed Brame's sentence on May 16, 2011. The court imposed the upper term for count 3. Nine days later, the court resentenced Brame using count 3 as the principle term and again imposed the upper term. As the People note, Brame does not suggest that any facts changed between May 16 and May 25, 2011. Nor has Brame pointed to any mitigating factors or other considerations likely to affect the court's decision on remand. Since there is no reasonable possibility that the court would alter its conclusion if required to state reasons, we would not remand the case for resentencing. (*People v. May* (1990) 221 Cal.App.3d 836, 840.)

Brame also argues that the court's failure to follow section 1170's statutory command violated his right to due process at sentencing. He relies on *Hicks v. Oklahoma* (1980) 447 U.S. 343 (*Hicks*) for his argument. There is no merit to this argument.

In *Hicks*, the jury was instructed under a habitual-offender statute, which was later declared unconstitutional, to sentence the defendant to a mandatory 40-year prison term. By Oklahoma statute, the defendant was entitled to have his punishment fixed by the jury.

Had the jury been instructed correctly, it could have imposed any sentence of not less than 10 years. The state appellate court acknowledged that the jury instruction was unconstitutional but affirmed the sentence, reasoning that the defendant was not prejudiced because his sentence was within the range of punishment that he could have received. (*Hicks, supra,* 447 U.S. at pp. 345-346.) The United States Supreme Court held that the state appellate court deprived the defendant of his liberty without due process of law. The court explained:

> "Where … a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Citations.] In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." (*Hicks, supra,* 447 U.S. at p. 346.)

There is no analogous "arbitrary disregard of [Brame's] right to liberty" in this case. Brame does not argue that the statutes under which he was sentenced are unconstitutional. He was not deprived of his right to have his sentence set by the trial court. His claim raises a technical statutory violation only.

B. Discretionary dismissal of prior "strike"

Brame contends that the trial court abused it discretion when it declined to dismiss his prior "strike" conviction.

A trial court's decision not to dismiss a prior "strike" conviction under the Three Strikes law is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The appellant bears the burden of establishing that the trial court's decision was unreasonable or arbitrary. (*People v.*

Superior Court (Alvarez) (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) We do not substitute our judgment for that of the trial court. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*).) "It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions." (*Ibid.*) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

Brame has not met his burden of showing the court's decision was irrational or arbitrary. He argues that the trial court limited itself to consideration of only a single factor—the fact that Brame was on parole at the time he committed the offense—and failed to consider all the factors weighing in favor of dismissing his prior conviction. A similar argument was rejected in *Myers*, *supra*, 69 Cal.App.4th at page 310. In that case, the trial court had read and considered the defendant's motion, which raised certain mitigating circumstances, but decided to deny his request to dismiss the prior strikes. "The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary. [Citation.] Thus, the fact that the court focused its explanatory comments on the violence and potential violence of appellant's crimes does not mean that it considered only that factor. Accordingly, appellant has not demonstrated that the trial court abused its discretion in denying his motion to strike prior convictions." (*Ibid.*)

Here, Brame's trial counsel filed a request to dismiss his prior felony, identifying factors in mitigation—Brame's age, the lack of violence in his criminal history, his current employment, and stable relationships. The court was aware of these factors but declined to dismiss the prior felony. The record discloses no abuse of discretion. Since we conclude the trial court did not abuse its discretion, we also reject Brame's due-process claim, which is premised on the assumption that the court failed to exercise its discretion.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Levy, J.

_____
Poochigian, J.